No. 48870-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

MICHAEL MURRAY, Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

#15-2-00566-1

BRIEF OF APPELLANT MICHAEL MURRAY

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INTRODUCTION

This appeal asks whether the Department of Labor and Industries must follow a unilateral Health Technology Clinical Committee (HTCC) coverage decision made without substantive agency or judicial review. As this Court recently concluded, "there is no statutory procedure for substantively challenging [Health Technology Clinical Committee] determinations." Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 627 n.13, 285 P.3d 187 (2012). The little-known Committee has unreviewable power to limit medical care given to injured workers.

On August 24, 2009, Michael Murray suffered multiple injuries while working for Brocks Interior Supply in Poulsbo, Washington. (Administrative Record (AR) 30)*. The Department accepted Mr. Murray's claim and took responsibility for "the condition diagnosed as right labral tear, determined by medical evidence to be related to accepted condition under this industrial injury." (AR 31). In other words, the Department would pay for all proper and necessary medical treatment for Mr. Murray's injured right hip.

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* The clerk did not provide clerk's paper citations to the Administrative Record from the Board of Industrial Appeals. All references are to the Administrative Record (AR) page number.

On September 20, 2013, Mr. Murray's attending physician, Dr. James Bruckner, recommended the only surgical procedure that could help him: arthroscopic osteoplasty of the acetabulum and/or femoral neck osteoplasty for treatment of femoral acetabular impingement (FAI), arthroscopic labral resection and/or arthroscopic synovectomy of the right hip joint. (AR 60-61). Without this FAI surgery, Mr. Murray's condition would deteriorate painfully until he qualifies for a hip replacement. (AR 60) And during this deterioration, he would remain unable to work.

Both the Department and the Board of Industrial Appeals denied authorization for the surgery. (AR 21) (AR 16). Neither examined whether this was proper and necessary care for Mr. Murray under the Industrial Insurance Act, RCW 51.36.010 and binding regulations, WAC 296-20-01002. Instead, because the HTCC, a committee under the State's Health Care Agency, concluded FAI surgery was unproven and therefore not covered, the Department and Board summarily rejected Mr. Murray's request. Wanting to return to work, Mr. Murray paid for the surgery on his own, and it successfully addressed his pain and lack of mobility. By any measure, it was proper and necessary care.

Mr. Murray now appeals. Denying workers compensation benefits without an individual determination or agency or judicial review is a fundamental violation of due process. By happenstance, the Legislature – after the Governor's partial veto -- granted the HTCC sweeping power over medical care in workers' compensation cases with no independent review. Mr. Murray has a vested right to proper and necessary medical care, including whether FAI surgery is appropriate for him. The HTCC's categorical exclusion of coverage, a unilateral, unreviewed, and unreviewable governmental decision, violates his right to due process. Michael Murray respectfully requests this Court to reverse the Department's denial of benefits.

I. ASSIGNMENTS OF ERROR

Mr. Murray assigns error to the Kitsap County Superior Court's Order on Summary Judgment, filed March 29, 2016. (Summary Judgment Order; CP 123-124) (Attached as Appendix A). Specific assignments of error include:

A. The trial court's conclusion that "Mr. Murray shows no constitutional violation" is an error of law. (Summary Judgment Order ¶ 2; CP 123).

B. The trial court's grant of summary judgment to the Department; denial of summary judgment to Mr. Murray; and entry of Judgment in favor of the Department are errors of law. (Summary Judgment Order at 2; CP 124).

Issues pertaining to these assignments of error are:

C. Washington's Industrial Insurance Act guarantees injured workers will "receive proper and necessary medical and surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice." RCW 51.36.010. The Department denied Michael Murray's claim based on the HTCC's decision that "current evidence on Femoroacetabular Impingement Syndrome (FAI) demonstrates that there is insufficient evidence to cover." (AR 79). Did the Department deny Mr. Murray due process by refusing to conduct an individualized determination, relying instead on an unreviewable HTCC decision?

D. "Delegation of legislative power is justified and constitutional...when it can be shown...that Procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power." Barry & Barry, Inc. v. State Dep't of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). Because its decisions are not subject to the APA or the Industrial Insurance

Act, the HTCC exercises unreviewed and unreviewable power over workers compensation benefits. Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 627, 285 P.3d 187 (2012). Is this delegation unconstitutional as applied to the Industrial Insurance Act?

E. "To fail to provide recourse for the claimant and physician who proceed with successful surgery, despite an absence of authorization...is to place simplistic, mechanical adherence to the medical aid rules above the requirement that the Industrial Insurance Act be liberally construed." Rogers v. Dept. of Labor and Indus., 151 Wn. App. 174, 184, 210 P.3d 355 (2009). Mr. Murray paid for FAI surgery on his own, and it was successful. Did the Department err by denying his claim nonetheless?

F. In Joy, this Court held that a worker's compensation claimant "may not obtain relief on appeal from L&I's denial of coverage for treatment, when L&I's denial is based on the HTCC's determination of non-coverage for such treatment under all state health plans." Joy, 170 Wn. App. at 627. Yet under RCW 70.14.120(4), nothing in the HTCC statute "diminishes an individual's right under existing law to appeal an action or decision of a participating agency regarding a state purchased health care program." Did the Joy court err by concluding that the Statute

prohibits the Department and all reviewing courts from making an individual determination of the treatment?

II. STATEMENT OF FACTS

Michael Murray worked for Brock's Interior Supply, a carpet company in Poulsbo, Washington. On August 24, 2009, he severely injured his hips at work, leading to this claim for workers' compensation. (AR 30). Dr. James Bruckner, a Board Certified Orthopedic Surgeon, diagnosed Mr. Murray with labral tears to his right hip and CAM femoroacetabular impingement (FAI). (AR 60). The Department accepted Mr. Murray's industrial insurance claim and the diagnosed injury to his right hip. (AR 30-32).

During the next four years, Mr. Murray pursued conservative treatment for his injured right hip, but his condition worsened. (AR 60). Throughout this he was unable to work. In 2013, Mr. Murray sought treatment with Dr. James Bruckner at Proliance Orthopaedics & Sports Medicine in Bellevue, Washington. (AR 60-61). Dr. Bruckner prescribed FAI surgery to repair the labral tears and CAM impingement in his hip. (AR 60).

As Dr. Bruckner described,

> [t]he surgical procedures for this condition are Arthroscopic Osteoplasty of the Acetabulum and/or Femoral Neck Osteoplasty for treatment of Femoral

> Acetabular Impingement, Arthroscopic Labral Resection and/or Arthroscopic Synovectomy of the hip joint....
>
> *There is no other surgery the Department covers that will address the worker's hip condition.* Michael has a surgical condition that the Department of Labor & Industries does not authorize the particular procedure needed to treat his hip.

(AR 60) (emphasis added).

The sole alternative to surgery – doing nothing – condemned Mr. Murray to increasing pain and deterioration until he qualified for a total hip replacement.

> This condition will go on for years due to inability to proceed with surgical treatment. Eventually, patient will develop end stage osteoarthritis, which ultimately occurs if this condition is not treated surgically, and require a total hip replacement in the future.

(AR 60).

Mr. Murray requested authorization from the Department for FAI surgery, but on October 30, 2013, the Department refused. (AR 21). In its order, the Department relied solely on the HTCC's determination that FAI surgery is not covered under any circumstances. (AR 21). No record exists of the Department reviewing Mr. Murray's medical condition, applying the relevant regulations, or consulting with a medical professional on the requested surgery.

On July 2, 2014, the Department affirmed its October 30, 2013 order, again without individual review. (AR 25). Mr. Murray timely appealed the Department's decision to the Board of Industrial Appeals.

Although the Board is not a "participating agency" under the HTCC statute, it considered itself bound by the HTCC's decision. (AR 19). On February 13, 2015, five and a half years after Mr. Murray's workplace injury, the Board affirmed the Department's denial of medical treatment. (AR 19). It did not hold a hearing or address whether the FAI surgery was necessary and proper care for Mr. Murray. Instead, it concluded summarily that "the decisions of the HTCC may not be overruled by the Board." (AR 19).

Mr. Murray did not postpone surgery for the Department's authorization. On October 20, 2014, he had arthroscopic FAI surgery, and two weeks later was recovering as expected.

> The right hip reveals the incisions have healed very nicely. No signs of infection. No increased warmth, erythema, or discharge. *He is ambulating with a normal heel-to-toe gait with no assistive device.* He is sitting comfortably with his hips flexed at 90 degrees.

(AR 67) (emphasis added). The surgery was a success, and rather than suffer from continuing deterioration and osteoarthritis, Mr. Murray is walking and sitting without pain.

Mr. Murray appealed the Board's decision to the Kitsap County Superior Court for a de novo trial under RCW 51.52.110. (Notice of Appeal; CP 1). He did not receive his trial, however. On March 29, 2016, Judge Kevin Hull granted summary judgment to the Department, concluding

> there are no genuine issues of material fact with respect to whether the Health Technology Clinic Committee (HTCC) has made a non-coverage decision regarding hip surgery for femoroacetabular impingement syndrome and that the Department of Labor & Industries is a participating agency per RCW 70.14.080(6) that must follow a determination of the HTCC. Mr. Murray shows no constitutional violation.

(Summary Judgment Order at 2; CP 124).

Mr. Murray now appeals.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's summary judgment *de novo*. Pendergrast v. Matichuk, __ Wn.2d __, __ P.3d __ No.92324-8 (Sept. 15, 2016) ("we review summary judgment de novo"). The Court construes the HTCC statute and Industrial Insurance Act *de novo.* "The resolution of this case depends entirely on statutory interpretation, a matter of law which we review de novo." Birrueta v.

Dep't of Labor & Indus. of the State of Washington, __ Wn.2d __, __ P.3d __ No. 92215-2 (Sept. 15, 2016).

IV. THE HTCC STATUTE, AS INTERPRETED IN JOY, CREATES UNREVIEWED AND UNREVIEWABLE COVERAGE DECISIONS

A. Washington's Industrial Insurance Act Guarantees Proper And Necessary Medical And Surgical Services

Industrial Insurance rests on a fundamental constitutional balance. Injured workers give up their constitutional right to access courts in exchange for "sure and certain relief." RCW 51.04.010.

> Washington's [Industrial Insurance Act] was the product of a grand compromise in 1911. Injured workers were given a swift, no-fault compensation system for injuries on the job. Employers were given immunity from civil suits by workers.

Birklid v. Boeing Co., 127 Wn.2d 853, 870, 904 P.2d 278 (1995). Workers compensation is not a need-based benefit program, but rather guaranteed payment for providing immunity to employers. "What they gave up for it is great, trial by jury and unlimited damages." Stertz v. Indus. Ins. Comm'n of Washington, 91 Wash. 588, 591, 158 P. 256 (1916), abrogated by Birklid v. Boeing Co., 127 Wn.2d 853, 904 P.2d 278 (1995).

In the beginning, Industrial Insurance only compensated workers for injuries. In 1917, the Legislature added medical care as a benefit until the injured worker's condition stabilized. Laws of 1917,

Ch. 28 § 5. "The injured worker may also recover medical expenses, but only while suffering a temporary disability; once the worker transitions from a temporary total disability to a permanent partial disability, medical benefits normally are no longer available." Dep't of Labor & Indus. of State v. Blanca Ortiz & Universal Frozen Foods, 194 Wn. App. 146, 151, 374 P.3d 258 (2016). "The condition of the worker must have reached a "fixed" state, meaning there is no further medical treatment that is likely to further improve his or her condition." State, Dep't of Labor & Indus. v. Slaugh, 177 Wn. App. 439, 446, 312 P.3d 676 (2013).

The Industrial Insurance Act describes the purpose for providing medical care.

> The legislature finds that high quality medical treatment and adherence to occupational health best practices can prevent disability and reduce loss of family income for workers, and lower labor and insurance costs for employers. Injured workers deserve high quality medical care in accordance with current health care best practices.

RCW 51.36.010(1). The key to providing high quality medical treatment, dating to 1917, is an individual determination of what care is necessary and proper for the injured worker.

> Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive *proper and necessary medical and*

> *surgical services at the hands of a physician or licensed advanced registered nurse practitioner of his or her own choice*, if conveniently located, except as provided in (b) of this subsection, and proper and necessary hospital care and services during the period of his or her disability from such injury.

RCW 51.36.010(2)(a) (emphasis added).

Also from the beginning, both injured workers and employers could appeal a decision on medical treatment to the State Medical Aid Board and then the courts. Laws of 1917, Ch. 28 § 11 ("from a decision of the state board an appeal will lie to the courts"); RCW 51.52.110 ("worker, beneficiary, employer or other person aggrieved by the decision and order of the board may appeal to the superior court").

Finally, the Department has extensive regulations defining necessary and proper medical and surgical services.

> **Proper and necessary:**
>
> (1) The department or self-insurer pays for proper and necessary health care services that are related to the diagnosis and treatment of an accepted condition.
>
> (2) Under the Industrial Insurance Act, "proper and necessary" refers to those health care services which are:
>
> > (a) Reflective of accepted standards of good practice, within the scope of practice of the provider's license or certification;

> (b) Curative or rehabilitative. Care must be of a type to cure the effects of a work-related injury or illness, or it must be rehabilitative. Curative treatment produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition. Rehabilitative treatment allows an injured or ill worker to regain functional activity in the presence of an interfering accepted condition. Curative and rehabilitative care produce long-term changes;
>
> (c) Not delivered primarily for the convenience of the claimant, the claimant's attending doctor, or any other provider; and
>
> (d) Provided at the least cost and in the least intensive setting of care consistent with the other provisions of this definition.

WAC 296-20-01002.

As this Court recognized in Roller v. Dep't. of Labor & Indus., 128 Wn. App. 922, 117 P.3d 385 (2005), "WAC 296-20-01002 requires that the Department pay for medical treatment that reflects good practice and is rehabilitative." Roller, 128 Wn. App. at 927-28. The Department must apply these regulations when deciding whether medical treatment is appropriate for an injured worker.

B. The Legislature And Governor Inadvertently Extinguished Claimants' Rights In The HTCC Statute

In 2006, the Legislature enacted a health technology assessment program as part of the State Health Care Authority. Laws of 2006, ch. 307 (health technology assessment); Laws of

2006, ch. 299 (Health Care Authority). The centerpiece of technology assessment was the Health Technology Clinical Committee.

> The legislature...created the HTCC, an 11-member panel of practicing licensed physicians and health professionals selected by the HCA's administrator in consultation with participating state agencies. The HTCC determines whether health technologies selected for review by the HCA's administrator will be included as a covered benefit in health care programs of participating agencies, i.e., L&I, the HCA, and the department of social and health services.

Joy v. Dep't. of Labor & Indus., 170 Wn. App. 614, 621, 285 P.3d 187 (2012).

When the Legislature adopted the HTCC statute, it included a section permitting an appeal from the Committee's decisions. "The administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the health technology clinical committee..." Laws of 2006, ch. 307 § 6. This appeal process was in addition to those preserved under participating agencies' statutes and regulations.

> Nothing in chapter 307, Laws of 2006 diminishes an individual's right under existing law to appeal an action or decision of a participating agency regarding a state purchased health care program. Appeals shall be

> governed by state and federal law applicable to participating agency decisions.

RCW 70.14.120(4).

Governor Christine Gregoire signed the HTCC statute, but vetoed the appeal provision in section 6, finding it *duplicative*.

> I strongly support [the bill] and particularly its inclusion of language that protects an individual's right to appeal. Section 5(4) of the bill states that "nothing in this act diminishes an individual's right under existing law to appeal an action or decision of a participating agency regarding a state purchased health care program. Appeals shall be governed by state and federal law applicable to participating agency decisions." This is an important provision and one that I support whole-heartedly.
>
> I am, however, vetoing Section 6 of this bill, which establishes an additional appeals process for patients, providers, and other stakeholders who disagree with the coverage determinations of the [HTCC]. The health care provider expertise on the clinical committee and the use of an evidence-based practice center should lend sufficient confidence in the quality of decisions made. Where issues may arise, I believe the individual appeal process highlighted above is sufficient to address them, without creating a duplicative and more costly process.

House Journal, 59th Leg., Reg. Sess., at 1587 (Wash.2006).

Without intending to, the Governor's veto eliminated an injured worker's right to appeal whether medical treatment is proper and necessary. In Joy, this Court ruled that HTCC's coverage decisions are final and cannot be challenged.

> We hold that RCW 70.14.120(3) controls over RCW 70.14.120(4), and Joy may not obtain relief on appeal from L & I's denial of coverage for treatment, when L & I's denial is based on the HTCC's determination of non-coverage for such treatment under all state health care plans.

Joy, 170 Wn. App. at 627. In a footnote, the Court recognized that HTCC decisions are unreviewed and unreviewable. "[T]he absence of remedies under RCW 70.14.120 for workers denied coverage by HTCC determinations is, nonetheless, a legislative problem that must be addressed by the legislature, not the courts." Joy, 170 Wn. App. at 627 n.13.

This is incorrect. Because the HTCC statute deprives injured workers like Mr. Murray of any ability to challenge a coverage decision, it is an unconstitutional violation of due process. Furthermore, the Court's decision in Joy impliedly repeals the Industrial Insurance Act's statutory and regulatory protections for injured workers, undermining the grand compromise at its heart. The HTCC statute cannot – and did not – give the Committee unilateral, unreviewable power to determine what is medically proper and necessary.

V. The HTCC Statute Violates The Due Process Clause.

On September 16, 2011, members of the HTCC voted on whether to exclude FAI surgery from coverage. Nine voted against coverage and two voted for it under certain conditions. (HTCC Minutes; AR 301). "The committee chair directed HTA staff to prepare a Findings and Decision document on FAI reflective of the majority vote." (AR 301). On November 18, 2011, the Committee issued its final decision, concluding "that the current evidence on Femoroacetabular Impingement Syndrome (FAI) demonstrates that there is insufficient evidence to cover." (HTCC Final Decision; AR 79).

The HTCC decision was controversial. When the Committee published a draft of its determination in July 2011, members of the medical and scientific communities quickly united against the proposal and wrote extensive letters highlighting multiple errors, calling the legitimacy of the HTCC's decision into question and indicating a bias in the decision-making process. (AR 256-390).

Medical experts documented that HTCC's determination was (1) inconsistent with the decisions of similar private, state and federal entities; (2) contradicted by a growing body of scientific evidence; and (3) based on a misunderstanding of what FAI syndrome is, how

the surgery is performed, and what scientific tests revealed. (AR 256-59, 289-91; 345, and 366-67). The Committee's background report revealed that Blue Cross/Blue Shield, Cigna, Harvard Pilgrim, and United Health Care all covered arthroscopic FAI surgery when conservative treatments had failed and the patient met required criteria. (AR 116-17) No insurer had a blanket exclusion like the HTCC's proposal.

Some doctors even suggested that the HTCC's process raised "concern about the objectivity and scientific integrity" of the Committee's decision. (AR 262). Dr. James Bruckner, the most experienced hip arthroscopist in Washington, noted that HTCC knowingly used biased questions in the fact-finding process and "systematically and artificially excluded" valid research that supported hip surgery to alleviate FAI's symptoms. (AR 354-55).

Despite this, the HTCC denied coverage for FAI surgery in all cases regardless of the circumstances. No court or administrative body can review the HTCC's decision and no check exists on the Committee's power to deny coverage.

A. The Complete Lack Of Administrative And Judicial Review Is Unreasonable And Unduly Oppressive

Under RCW 70.14.120(3), the HTCC's decision not to cover FAI surgery "shall not be subject to a determination in the case of an individual patient as to whether it is medically necessary, or proper and necessary treatment." Had the Governor not vetoed the right to individual appeals, this provision might have been enforceable. Aggrieved parties would have had the right to challenge HTCC decisions in court. But as it stands, the HTCC may unilaterally deny vested benefits with no judicial or administrative review whatsoever.

The Fifth Amendment of the United States Constitution and Article I Section 3 of the Washington State Constitution both provide that "no person shall be deprived of life, liberty, or property, without due process of law." Here, Michael Murray has a property interest in proper and necessary medical care because he has a vested right under the Industrial Insurance Act. Willoughby v. Dep't of Labor and Indus., 147 Wn.2d 725, 733, 57 P.3d 611 (2002) ("all workers who suffer an industrial injury covered by the Industrial Insurance Act, Title 51 RCW, have a vested interest in disability payments upon determination of an industrial injury"). Proper and necessary medical care, like disability payments, is a vested benefit under the Act.

Willoughby, 147 Wn.2d at 732 ("legitimate claims of entitlement generally entail vested liberty or property rights").

The State can deprive Mr. Murray of his vested right only with due process of law.

> Whether a statute deprives one of life, liberty, or property without due process depends on "(1) whether the [statute] is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive.

Willoughby, 147 Wn.2d at 733. The HTCC statute's complete denial of administrative and judicial review violates the second and third factors of the test.

The Health Care Authority Act and the technology assessment program have a legitimate public purpose: "minimizing the financial burden which health care poses on the state, its employees, and its charges, while at the same time allowing the state to provide the most comprehensive health care options possible." RCW 41.05.006(2). One method to achieve this goal is to "coordinate state agency efforts to develop and implement uniform policies across state purchased health care programs." RCW 41.05.013.

The means used to achieve this purpose, however, are unreasonable. The HTCC statute insulates the Committee's decisions from any form of review. Under federal and State constitutional decisions, this is below the minimum due process required. In Matthews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the United States Supreme Court provided the standard for deciding what process is due.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. at 335.

Here, Mr. Murray should have at least one opportunity to challenge the HTCC's decision. The private interest at stake – proper medical care through Industrial Insurance – is compelling. As noted above, injured workers like Mr. Murray *have no alternative* to Industrial Insurance. They have given up their right to sue. "There must eventually come a "tipping point," where the diminution of benefits becomes so significant as to constitute a *denial* of benefits—

thus creating a constitutional violation." Westphal v. City of St. Petersburg, 194 So. 3d 311, 323 (Fla. 2016).

Second, the risk of erroneous deprivation is high. The HTCC did not examine whether FAI surgery would benefit individual patients; it considered the cost of the procedure versus the available evidence of efficacy. The Committee did not conclude FAI surgery was unsafe or ineffective, only that current evidence is insufficient.

Because outcomes from new procedures are unproven, both the Department and reviewing courts authorize surgical procedures *in hindsight*.

> The law is clear that when an industrial insurance claimant undertakes a medical procedure that requires Department authorization, any claim for *postsurgery* reimbursement is contingent upon a showing that the treatment was proper and necessary. The law is equally clear that this means demonstrating in hindsight, that the treatment was curative or rehabilitative.

Rogers v. Dep't. of Labor and Indus., 151 Wn. App. 174, 185, 210 P.3d 355 (2009). The HTCC statute extinguishes any possibility of correcting errors, depriving Mr. Murray of his right to prove FAI surgery was successful.

Third, allowing claimants to seek review of HTCC coverage decisions – like the Department's decisions – creates no additional

administrative burdens. The Governor's veto message assumed that current appeal procedures would correct any errors in HTCC determinations. By allowing workers' compensation claimants to challenge a blanket HTCC decision, the State will pay only for what it has already promised – proper and necessary medical care.

No reasonable dispute should exist that insulating the HTCC from any form of review is unreasonable. The State can achieve the goal of uniform health care policies without depriving claimants of their right to an individual determination of what is necessary and proper care.

Finally, prohibiting review of HTCC decisions is unduly oppressive. No one intended this outcome, but HTCC statute now presumes that eleven unelected individuals will never make a mistake, will never fail to review important information, and will never be swayed by evidence that others find insufficient. Administrative and judicial review exists because this presumption is never true. Even the HTCC will err.

B. The HTCC Statute Is An Unconstitutional Delegation Of Legislative Power

By granting it unreviewable authority, the Legislature improperly delegated its legislative power to the HTCC.

> [T]he delegation of legislative power is justified and constitutional, and the requirements of the standards doctrine are satisfied, when it can be shown (1) that the legislature has provided standards or guidelines which define in general terms what is to be done and **543 the instrumentality or administrative body which is to accomplish it; and (2) that Procedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power.

Barry & Barry, Inc. v. State Dep't of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). As the Barry court emphasized, the delegation doctrine retains its purpose "of protecting against unnecessary and uncontrolled discretionary power." Barry, 81 Wn.2d at 161.

The lack of any administrative or judicial review invalidates this flawed delegation of power. Under RCW 70.14.090(4), "neither the committee nor any advisory group is an agency for purposes of chapter 34.05 RCW [the Administrative Procedure Act]." There are no procedural safeguards to control arbitrary Committee action or its abuse of discretionary power. At least one Superior Court has ruled this delegation unconstitutional. See Sund v. Regence Blue Shield, King County No. 13-2-03122-1 SEA, Memorandum Decision on Pending Motions for Summary Judgment (Oct. 22, 2013) ("RCW 70.14.120(3) as interpreted by Joy is an unconstitutional delegation of administrative authority") (Attached as Appendix B).

Washington law prohibits delegation of uncontrolled discretionary power. In Brown v. Vail, 169 Wn.2d 318, 237 P.3d 263 (2010), the Supreme Court emphasized the need for agency and judicial review.

> When reviewing whether authority has been properly delegated to an agency to promulgate rules subjecting individuals to criminal sanctions, we have focused on the *safeguard* requirement. This requirement is satisfied where rules are promulgated pursuant to the Administrative Procedure Act (APA), chapter 34.05 RCW, and include an appeal process before the agency, or judicial review is available, and the procedural safeguards normally available to a criminal defendant remain.

Brown, 169 Wn.2d at 331. Because Mr. Murray has a vested right to proper and necessary medical care, the Legislature cannot delegate unreviewable authority to the HTCC to define it.

VI. THIS COURT IN JOY INCORRECTLY ELIMINATED CLAIMANTS' RIGHTS TO REVIEW

In Joy, this Court enforced RCW 70.14.120(3) – prohibiting individual determinations of proper and necessary treatment – above other provisions in the HTCC statute.

> RCW 70.14.120(1) specifically addresses L & I's compliance with HTCC determinations and RCW 70.14.120(3) specifically addresses and precludes individualized medically and necessary proper determinations. In contrast, RCW 70.14.120(4) generally addresses appeals.

Joy v. Dep't of Labor & Indus., 170 Wn. App. 614, 627, 285 P.3d 187, 193 (2012). This incorrectly favored HTCC decisions over conflicting statutory requirements in the Industrial Insurance Act.

Although RCW 70.14.120(1) mandates that the Department of Labor and Industries as a "participating agency shall comply with the determination" of the HTCC, the Board of Industrial Insurance Appeals, a judicial body, is not a participating agency. Once it has jurisdiction to decide a claimant's appeal, the Board has authority to decide all issues in the appeal on the merits.

Both the HTCC statute and the Governor's veto message recognize that the statute does not diminish "an individual's right under existing law to appeal an action or decision of a participating agency regarding a state purchased health care program." RCW 70.14.120(1). As the Governor concluded, "where issues may arise, I believe the individual appeal process highlighted above is sufficient to address them, without creating a duplicative and more costly process." House Journal, 59th Leg., Reg. Sess., at 1587 (Wash.2006). The only issue in an HTCC decision is whether an exception exists for a specific claimant.

The Joy decision erred by expanding "participating agency" to include the Board and reviewing courts, binding them to HTCC

decisions. This creates the untenable result of Mr. Murray having the right to file an appeal, but no right to relief. Although Mr. Murray may appeal the Department's denial of his hip surgery, and both the Board and reviewing courts may hear the arguments, neither the Board nor the reviewing courts may reverse the Department's decision even though it is clearly erroneous.

> A system of redress for injury that requires the injured worker to legally forego any and all common law right of recovery for full damages for an injury, and surrender himself or herself to a system which, whether by design or permissive incremental alteration, subjects the worker to the known conditions of personal ruination to collect his or her remedy, is not merely unfair, but is fundamentally and manifestly unjust.

Westphal v. City of St. Petersburg, 194 So. 3d 311, 326 (Fla. 2016).

The only way to avoid this absurd conclusion is to apply RCW 70.14.120(3) to participating agencies only, not the Board or courts.

VII. Mr. Murray Is Entitled To An Award Of Reasonable Attorneys' Fees

Under RCW 51.52.130(1), "if, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker...a reasonable fee for the services of the worker's...attorney shall be fixed by the court." Because he has shown that the HTCC statute violates his right to due process and

the Department denied him reimbursement for proper and necessary medical care, Mr. Murray is entitled to an award of reasonable attorneys' fees at trial and on appeal. Brand v. Dep't. of Labor & Indus., 139 Wn.2d 659, 670, 989 P.2d 1111 (2000).

CONCLUSION

Washington courts require administrative and judicial review for good reason. No administrator or committee is infallible. Because Appellant Michael Murray has a vested interest in proper and necessary medical care under the Industrial Insurance Act, he has the right to review *the substance* of a decision denying that care.

Mr. Murray respectfully requests the Court to find the HTCC Statute's denial of review unconstitutional, reverse the Department's decision denying reimbursement for his FAI surgery, and award him reasonable attorneys' fees for this case.

DATED this 10 day of October, 2016.

BURI FUNSTON MUMFORD, PLLC

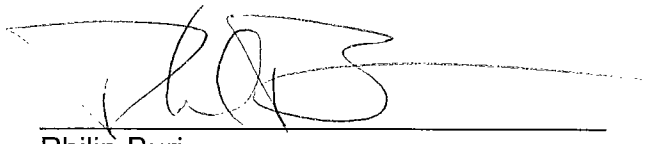
By _____
Philip J. Buri, WSBA #17637
1601 F. Street
Bellingham, WA 98225
360/752-1500

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Brief of Appellant Michael Murray to:

Anastasia R. Sandstrom
Attorney General's Office
800 5th Ave Ste 2000
Seattle WA 98104-3188

DATED this 10 day of October, 2016.



Philip Buri

3/29/16 SPL
4/8/16

STATE OF WASHINGTON
KITSAP COUNTY SUPERIOR COURT

MICHAEL MURRAY, Petitioner v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent	NO. 15-2-00566-1 ORDER ON SUMMARY JUDGMENT

This matter came before the Court for hearing on the Department and Petitioner's motions for summary judgment.

The Court heard the oral argument of counsel for the Department, Jessica Creighton, and counsel for the Petitioner, Jordan Couch. The Court also considered the following documents:

-The Certified Appeal Board Record;

-Department's Memorandum and Motion for Summary Judgment;

-Plaintiff's Motion for Summary Judgment including attachments;

-Department's Response to Plaintiff's Motion for Summary Judgment including attachments;

-Response to Defendant's Motion for Summary Judgment;

Appendix A

-Department's Reply Re Department's Motion for Summary Judgment;

-Reply in Support of Plaintiff's Motion for Summary Judgment including attachments.

Based on the argument of counsel and the evidence presented, the Court finds:

1. The Court has jurisdiction over the parties to, and the subject matter of, this appeal.

2. No are no genuine issues of material fact with respect to whether the Health Technology Clinic Committee (HTCC) has made a non-coverage decision regarding hip surgery for femoroacetabular impingement syndrome and that the Department of Labor & Industries is a participating agency per RCW 70.14.080(6) that must follow a determination of the HTCC. Mr. Murray shows no constitutional violation.

Based on the above findings, IT IS ORDERED:

1. The Petitioner's Motion for Summary Judgment is DENIED;
2. The Department's Motion for Summary Judgment is GRANTED.
3. Judgment shall be entered in favor of the Department.

DATED this 29th day of March, 2916

KEVIN D. HULL, JUDGE

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KITSAP COUNTY

MICHAEL MURRAY Petitioner, v. DEPARTMENT OF LABOR & INDUSTRIES Respondent.	No. 15-2-00566-1 DECLARATION OF MAILING

I, Kyle Gallagher, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On March 29, 2016, I caused a copy of **Order on Summary Judgment** from **Judge Kevin Hull** to be served in the manner noted on the following:

Patrick Palace Palacelaw PO Box 65810 Tacoma, WA 98464-0029	☒ Via U.S. Mail
Jessica Creighton Washington State Attorney General's Office 800 Fifth Ave Ste 2000 Seattle, WA 98104-3188	☒ Via U.S. Mail

DATED this 29th day of March, 2016, at Port Orchard, Washington.

Kyle Gallagher
Judicial Law Clerk

RECEIVED
MAR 31 2016
PALACE LAW

RECEIVED
APR 29 2016
PALACE LAW

Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366

The Honorable Beth Andrus

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

GARY SUND and DENISE IRISH, husband and wife, and the marital community formed thereof, Plaintiffs, v. REGENCE BLUESHIELD; WASHINGTON STATE HEALTHCARE AUTHORITY'S PUBLIC EMPLOYEE BENEFITS BOARD PROGRAM; and UNIFORM MEDICAL PLAN, Defendants.	NO. 13-2-03122-1 SEA MEMORANDUM DECISION ON PENDING MOTIONS FOR SUMMARY JUDGMENT

PLEADINGS REVIEWED

The Court has reviewed the following pleadings on the pending dispositive and non-dispositive motions:

1. Defendant Regence Blueshield's motion for summary judgment (Dkt. #13):
    a. Declaration of Trisha McIntee (Dkt. #14);
    b. Declaration of Trisha McIntee (Dkt. #23);
    c. State Defendant's Response to Defendant Regence Blueshield's motion for summary judgment (Dkt. #24);
    d. Plaintiffs' response to Defendants' motions to dismiss and for summary judgment (Dkt. #26);

Appendix B

e. Declaration of Denice Irish (Dkt. #27);

f. Declaration of Johyn D. Loeser, M.D. (Dkt. #28);

g. Declaration of Glen J. David M.D. (Dkt. #29);

h. Declaration of William C. Smart (Dkt. #30);

i. Defendant Regence Blueshield's Reply to State Defendant's Response (Dkt. #32);

j. Defendant Regence Blueshield's Reply to Plaintiffs' Opposition (Dkt. #33);

k. Declaration of Kendra Neumiller (Dkt. #34);

l. Declaration of Medora A. Marisseau (Dkt. #35);

m. Regence's Reply in Support of motion for summary judgment (Dkt. #84)

2. Defendant Washington State Healthcare Authority's motion to dismiss under CR 12(b)(6) and (alternatively) motion for summary judgment (Dkt. #16):

a. Declaration of David M. Iseminger supporting State Defendant's motion to dismiss or summary judgment (Dkt. #17);

b. Plaintiffs' response to Defendants' motions to dismiss and for summary judgment (Dkt. #26);

c. Declaration of Denice Irish (Dkt. #27);

d. Declaration of Johyn D. Loeser, M.D. (Dkt. #28);

e. Declaration of Glen J. David M.D. (Dkt. #29);

f. Declaration of William C. Smart (Dkt. #30);

g. State Defendant's Reply to Plaintiff's Response to Defendants' motions for summary judgment (Dkt. #36);

h. Plaintiffs' Response to State's motion for summary judgment (Dkt. #74);

i. State Defendant's Reply to State's motion for summary judgment (Dkt. #90);

j. Errata to the Second Declaration of David Iseminger (Dkt. #87);

k. Second Declaration of David Iseminger (Dkt. #88 & #96);

l. Declaration of Chantel Gagnon-Bailey (Dkt. #97)

3. Plaintiffs' motion for partial summary judgment on breach of contract and regulatory violations (Dkt. #72):
    a. Declaration of Isaac Ruiz in support of Plaintiffs' cross motions for summary judgment (Dkt. #66 & 67);
    b. Declaration of Glen J. David M.D. (Dkt. #73);
    c. Regence's Opposition to Plaintiffs' motion for partial summary judgment (Dkt. #76);
    d. Declaration of Nicole Oishi (Dkt. #77);
    e. State's Response to Plaintiffs' motion for partial summary judgment (Dkt. #78B and #81);
    f. Declaration of Michelle George (Dkt. #78C);
    g. Second Declaration of David Iseminger (Dkt. #78D);
    h. Declaration of Chantel Gagnon-Bailey (Dkt. #79);
    i. Plaintiffs' Reply in support of motion for summary judgment (Dkt. #92)
4. Plaintiffs' motion for partial summary judgment holding that the HTCC law is unconstitutional (Dkt. #70):
    a. Declaration of Isaac Ruiz in support of Plaintiffs' cross motions for summary judgment (Dkt. #66 & 67);
    b. Declaration of Glen J. David M.D. (Dkt. #73);
    c. Regence's Response to Plaintiffs' motion for summary judgment (Dkt. #78);
    d. State's Response to Plaintiffs' summary judgment motion (Dkt. #78A and #80);
    e. Declaration of Michelle George (Dkt. #82);
    f. Declaration of Chantel Gagnon-Bailey (Dkt. #85 & #86);
    g. Plaintiffs' Reply in support of motion for summary judgment (Dkt. #93);
    h. Supplemental Declaration of Isaac Ruiz (Dkt. #94)

The Court has also reviewed the following pleadings:

5. Order Granting Plaintiffs' motion for summary judgment holding the HTCC law unconstitutional (Dkt. #108)
6. Order for Specific Performance (Dkt. #109)
7. State's Supplemental Response Brief on Available Remedies (Dkt. #100 & #101)
8. Plaintiffs' Supplemental Brief re: Remedies (Dkt. #102 & #110)
    a. Declaration of William C. Smart in support of Plaintiffs' Supplemental Brief re Remedies (Dkt. #103);
    b. Declaration of Denice Irish regarding photographs (Dkt. #106)
    c. State's Objections to Plaintiffs' Supplemental Brief on Remedies and Reply.
9. Order vacating summary judgment and order on recusal (Dkt. #115).
10. Temporary Order of Specific Performance (Dkt. #116).
11. Plaintiff's motion for re-entry of summary judgment orders and for attorney fees dated October 3, 2013 (Dkt. #134).
    a. State's Response to Plaintiffs' Motion for Re-Entry of Summary Judgment Orders and For Attorney Fees (Dkt. #138)
    b. Fourth Declaration of David Iseminger (Dkt. #139).

UNDISPUTED FACTS

Based on the foregoing pleadings and argument of counsel, the Court summarizes the key undisputed facts:

Plaintiff Gary Sund is a retired Clallam County superior court judge and commissioner. Plaintiff Denice Irish is his wife and is a current employee of the State of Washington. Ms. Irish is provided health insurance through the state Health Care Authority's Public Employee Benefits Program (PEBB). State employees, such as Ms. Irish, may choose from one of several insurance plans offered by the PEBB. Ms. Irish and her husband are insured under HCA's self-insured

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plan, known as the Uniform Medical Plan (UMP). The remaining Defendant is the Washington HCA. The plan is administered for the HCA by Regence Blueshield.[1]

Judge Sund seeks insurance coverage for a medical procedure known as spinal cord stimulation (SCS) to treat severe chronic and debilitating pain in his lower right extremity. According to his treating physician, the pain is the result of a condition known as Chronic Regional Pain Syndrome (CRPS). SCS involves the implantation of wires that send a small electrical current to the spine. The current changes pain signals going to the brain. Usually, this treatment is only considered for patients who have unsuccessfully undergone more conservative and less-invasive therapies, such as medication, physical therapy and injections. Judge Sund was diagnosed with CRPS in the fall of 2011 and his physician recommended a trial of SCS, the typical first step in the process, in November 2011. Judge Sund's neurologist sought pre-authorization for an SCS trial on November 30, 2011. The HCA, through Regence, denied this request on December 15, 2011, relying on an October 22, 2010 decision of a committee known as the Health Technologies Clinical Committee (HTCC).

In 2006, the Washington state legislature created the HTCC, an 11-member panel of practicing licensed physicians and health professionals, to decide whether a medical procedure should be included as a covered benefit in state health care programs. Joy v. Department of Labor & Industries, 170 Wn. App. 616, 621, 285 P.2d 187 (2012); RCW 70.14.090; RCW 70.14.080(6). Under RCW 70.14.100, the Health Technology Assessment (HTA) administrator contracts with an outside research firm to assess selected technologies' safety, efficacy and cost-effectiveness. The HTCC reviews the research report and decides if the health technology should be included as a covered benefit. RCW 70.14.110.

The HTA administrator must:

> (d) Require the assessment to: (i) Give the greatest weight to the evidence determined, based on objective indicators, to be the most valid and reliable, considering the nature

[1] On October 11, 2013, the Court granted the motion for summary judgment filed by Defendant Regence Blueshield.

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> and source of the evidence, the empirical characteristic of the studies or trials upon which the evidence is based, and the consistency of the outcome with comparable studies; and (ii) take into account any unique impacts of the technology on specific populations based upon factors such as sex, age, ethnicity, race, or disability.

RCW 70.14.100(4)(d). In addition, the HTCC's decisions:

> ... shall be consistent with decisions made under the federal Medicare program and in expert treatment guidelines, including those from specialty physician organizations and patient advocacy organizations, unless the committee concludes, based on its review of the systematic assessment, that substantial evidence regarding the safety, efficacy, and cost-effectiveness of the technology supports a contrary determination.

RCW 70.14.110(3).

On October 22, 2010, the HTCC decided that SCS is less safe than other available treatments for chronic neuropathic pain, and that the medical effectiveness and cost-effectiveness of SCS for this particular condition remains unproven. The Committee voted 8-to-1 not to cover SCS for chronic neuropathic pain. According to the web materials supplied by the HCA, the draft report was published on June 25, 2010, public comments were solicited from June 25 to July 16, 2010, the final report was published on July 21, 2010, and the HTCC conducted a public meeting to discuss the report on August 20, 2010. The HTCC draft and final reports were available to the public on the Committee's website throughout 2011.

On January 4, 2011, the HCA met with Regence to discuss implementation of the HTCC decision. Both the HCA and Regence recognized that the 2011 Certificate of Coverage for the UMP, drafted in November 2010, did not explicitly identify SCS as an exclusion. Regence requested that the HCA postpone the implementation of the SCS decision until the exclusion could be incorporated into the new 2012 Certificate of Coverage. An HCA representative rejected this request and instructed Regence to implement the decision as quickly as possible. The implementation became effective July 1, 2011. At oral argument, counsel for the HCA conceded that no notice was given to plan members that the SCS exclusion would become effective mid-plan year. Nor has the HCA explained why the decision was implemented on July 1, 2011, rather than on some other date.

Under the section entitled "Benefits: what the Plan Covers," the 2011 UMP provided:

> For this plan to cover a service or supply, it must been all of the following requirements:
>
> - Be medically necessary
> - Follow the plan's coverage policies and preauthorization requirements
> - **Follow coverage decisions made by the Washington State Health Technology Clinical Committee, which evaluates health technologies for effectiveness, safety and cost** (emphasis added).

2011 UMP at 13. The plan, however, did not specify when a coverage decision would go into effect or notify plan members that coverage decisions could take effect mid-plan year.

In the fall of 2011, the HCA drafted the 2012 UMP Certificate of Coverage and included language that HTCC decisions could go into effect mid-year and also included a clear and unambiguous exclusion for SCS:

> **Health Technology Clinical Committee**
>
> Under state law, UMP Classic must follow coverage decisions made by the HTCC. If the Committee has determined that a service or treatment is not covered, then medical necessity is not an issue: it simply isn't covered (see exclusion 63 on page 50). ... Please note that these decisions may be made and take effect at any time during the plan year. You may view final decisions and ongoing reviews at www.hta.hca.wa.gov.

2012 UMP at 14. Exclusion 63 included "Services ... determined not to be covered by the state HTCC." *Id.* at 50. Exclusion 68 included "Spinal cord simulator for chronic neuropathic pain." *Id.* The 2012 Certificate of Coverage was available to plan members, including Ms. Irish, on the Internet by November 1, 2011. The open enrollment period for 2012 benefits was the month of November. Ms. Irish and Judge Sund apparently opted to remain insured under the 2012 UMP during the 2011 open enrollment period.

On October 31, 2011, Judge Sund's neurologist, Dr. Glen David, determined that Judge Sund was a good candidate for SCS. He recommended a psychological evaluation and an SCS trial. On November 16, 2011, the psychological evaluator found Judge Sund to be a good candidate for the SCS treatment. Thus, on November 30, 2011, Dr. David sought

preauthorization from Regence for a trial of SCS. The pre-authorization request identified the procedure as diagnostic in nature with a planned date of service of "[To be scheduled] ASAP."

At that point, Judge Sund's condition was quite dire. He was in extreme pain and had lost substantial weight. His physician indicated that Judge Sund was literally wasting away. At six feet tall, he weighed less than 120 pounds.

On December 15, 2011, Regence denied the request for preauthorization, relying on the HTCC decision that SCS is not a medically necessary procedure for chronic neuropathic pain. On February 10, 2012, Dr. David appealed the denial on his client's behalf, noting that Judge Sund continued to suffer from severe and debilitating pain. On February 21, 2012, Regence requested an Independent Medical Review to confirm that Judge Sund's condition was in fact the result of chronic neuropathic pain, rather than some other condition that might be covered under the UMP. The reviewing physician confirmed, from reviewing Judge Sund's records, that the pain was neuropathic in nature. As a result, on February 22, 2012, Regence notified Dr. David and Judge Sund that SCS was not a covered medical treatment under the 2012 UMP.

On June 7, 2012, Judge Sund filed a second level appeal of the denial of the SCS trial. On June 21, 2012, an appeal panel met to discuss the appeal and, by letter dated the same day, notified Judge Sund that under the HTCC decision and the 2012 UMP, the SCS trial was not a covered benefit.

At some point, Judge Sund and Ms. Irish exhausted their savings and a part of Judge Sund's retirement fund to pay for the SCS trial. According to Ms. Irish, the change in his condition was startlingly good. Judge Sund was able to focus, sleep, walk more than 100 feet, and work in the garden. His physicians noted that the trial showed a 50 percent reduction in pain in the worst areas and more than that in other areas. Within hours of removing the trial stimulator, his severe pain returned and his mobility immediately diminished. His physician described his response to the trial as excellent and recommended that he undergo a permanent implantation of the stimulator.

On August 17, 2012, Dr. Ryder Gwinn, another physician involved in Judge Sund's care, submitted a request to Regence for preauthorization for the permanent SCS procedure. On August 30, 2012, Regence notified Judge Sund that SCS was not a covered benefit for the treatment of CRPS. On September 5, 2012, Ms. Irish appealed that decision. On September 17, 2012, Regence forwarded the request to an independent review board (IRB). On October 4, 2012, the IRB affirmed the denial of coverage based on the SCS exclusion in the 2012 UMP.

This lawsuit followed. Judge Sund contends that the HTCC law, as interpreted by the Joy court, is unconstitutional because it denies him any judicial review of the coverage decision. At issue on the pending motion is the contention that the law constitutes an impermissible delegation of lawmaking power to an unelected commission. Judge Sund also contends (among other things) that the HCA breached its insurance contract by denying coverage for the SCS trial and permanent surgical implantation, violated the Patient's Bill of Rights by failing to disclose the SCS exclusion in the 2011 UMP, and violated WAC 284-44-030 by failing to list the exclusion in the 2011 policy.

ANALYSIS

1. Judge Sund's Contract & Regulatory Violation Claim Against the HCA

Judge Sund argues that because the 2011 UMP did not exclude SCS, the HCA breached the insurance agreement by denying coverage for both the trial and the permanent SCS procedure. The HCA contends RCW 70.14.120 required it to enforce the HTCC decision in 2011 and that it had to deny coverage. The HCA also argues that there was a clear SCS exclusion in the 2012 policy and that contractually it was entitled to deny coverage during that plan year.

This Court concludes that (a) the HCA had no legal obligation or contractual authority to unilaterally modify the 2011 UMP to exclude SCS while that plan remained in effect; and (b) the HCA did have the legal and contractual authority to expressly exclude SCS in the 2012 UMP.[2]

[2] During oral argument, counsel for Judge Sund argued that the HCA could not exclude SCS in 2012 because RCW 41.05.065 requires the state to maintain benefits at a substantially equivalent level as benefit plans in

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a. **Modification to 2011 UMP**

The HCA concedes that the 2011 UMP Certificate of Coverage is a contract and that until July 1, 2011, SCS for chronic neuropathic pain was a covered benefit under the 2011 UMP. The HCA has cited to no authority for the proposition that an insurance carrier may unilaterally modify the terms of an insurance policy mid-plan year without notice to the insured. While terminable-at-will agreements may be unilaterally modified, Duncan v. Alaska USA Federal Credit Union, Inc., 148 Wn. App. 52, 77, 199 P.3d 991 (2008), one party cannot otherwise unilaterally modify a contract. Jones v. Best, 134 Wn.2d 232, 240, 950 P.2d 1 (1998). This Court can find nothing to suggest that the UMP is terminable at will by the HCA; thus, the HCA has no legal authority to modify its coverage by adding exclusions in the middle of a plan year.

The HCA cites to the 2011 plan language that it will "follow coverage decisions made by the [HTCC]." But that language does not reserve to the HCA the right to add exclusions to the policy in the middle of a plan year.[3]

Additionally, this language is ambiguous. Ambiguously worded contracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable. Walsh v. Schlecht, 429 U.S. 401, 408, 97 S.Ct. 679, 50 L.Ed.2d 641 (1977). Under RCW 41.05.017, the UMP is subject to the provisions of RCW 43.505 to 48.43.535. RCW 48.43.510(1)(b) provides that the HCA may not offer to sell a health plan without offering to provide a list of exclusions **before** the plan is selected by an employee. This statute gives purchasers of health insurance the right to know of all exclusions before choosing the plan. Given this statutory right, it makes no sense to allow the HCA to impose an undisclosed exclusion on plan members who are signed up for the plan. The

effect on January 1, 1993. This argument, however, was not pled or briefed by the parties. The Court has no evidence that SCS was a benefit extended to state employees in 1993.

[3] Such a reservation of rights may not be permissible in any event. *See* National Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 883, 297 P.2d 688 (2013) (suggesting that an insurance carrier cannot reserve the right to unilaterally modify a contract of insurance during the plan period).

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Court finds unpersuasive the HCA's argument that it has the legal authority to unilaterally add exclusions to the UMP in the middle of a plan year.

Nor did the HCA have the legal obligation to impose the HTCC decision on its members before issuing the 2012 Certificate of Coverage. RCW 70.14.120(1) does require the agency to comply with a decision of the HTCC but it does not state when compliance must commence. WAC 182-55-040(2), a rule governing the Health Technology Assessment Program, provides that when an HTCC decision is published, the agency will implement the committee's determination "according to their statutory, regulatory **or contractual process.**" This regulation recognizes that the HCA's contractual process may govern when it may start implementing exclusions mandated by the HTCC. Indeed, the fact that the HCA relied on an employee to make the somewhat arbitrary decision to implement the decision on July 1, 2011, supports the notion that the law does not obligate the HCA to implement the SCS exclusion mid-plan year.

Based on the foregoing analysis, and the undisputed facts before the Court, the HCA's denial of coverage for the SCS trial on December 15, 2011 was impermissible and a breach of the 2011 UMP.[4]

The Court does not rule, however, on the issue of causation. As the parties discussed at oral argument, there is insufficient evidence before the Court to determine whether the surgical procedure necessary to start the SCS trial would have or could have occurred in December 2011. Moreover, under RCW 48.43.525, a health carrier may not retrospectively deny coverage for care that had prior authorization at the time the care was rendered. Had the HCA granted pre-authorization in December 2011 and Judge Sund's physician performed the SCS trial in reliance on this pre-authorization (even if the procedure occurred in 2012), the HCA could not have legally denied coverage after the procedure had occurred. The Court leaves the issue of causation for another day.

[4] The parties dispute whether WAC 284-44-030, requiring insurance policies to contain a complete list of all exclusions, applies to the HCA. The Court agrees that there is no private cause of action for a violation of this regulation. Given the Court's interpretation of RCW 48.43.510, whether the regulation applies to the HCA is a moot point.

b. **Changes to 2012 UMP**

From a contractual standpoint, the HCA had the legal authority to implement the HTCC decision in its 2012 UMP. It explicitly excluded SCS as a covered treatment for chronic neuropathic pain. The Certificate of Coverage was available on-line for plan members such as Ms. Irish to review before deciding whether to renew under that plan. Based on the undisputed facts, the HCA's denial of coverage for the permanent SCS procedure in 2012 did not breach the 2012 UMP.

The 2011 UMP did not apply to the 2012 request for coverage for the permanent SCS surgical procedure. Judge Sund asks the Court to find that the SCS trial and the permanent surgical procedures are one and the same for purposes of coverage. He contends that if the trial should have been covered under the 2011 UMP, then the permanent SCS procedure should similarly be covered under the same policy. The Court disagrees. The purpose of undergoing a "trial" is to determine if the treatment will be effective for a particular patient. Once data from the trial are known, the insurer would have had the contractual right to reassess medical necessity of the permanent procedure based on the results of the trial. Thus, the HCA's breach of the 2011 UMP does not result in coverage for the permanent surgical implantation of a stimulator in 2012.

2. **Judge Sund's Constitutional Claim of Unlawful Delegation of Legislative Power**[5]

Judge Sund challenges the HTCC's conclusion that SCS has not been demonstrated to be safe and effective for people diagnosed with CRPS who have successfully undergone a trial of the procedure. He also argues that the HTCC decision conflicts with Medicare's policy of covering the procedure for cases such as his. He has presented expert testimony that the procedure is medically necessary for him.

Under Joy, the HTCC law prohibits Judge Sund from challenging the HTCC's decision on medical necessity. RCW 70.14.120 (3) provides:

[5] Plaintiffs challenge the HTCC law on several constitutional grounds but have not briefed any of the arguments other than the delegation issue. Plaintiffs expressly noted their intention to address the other constitutional issues in later briefing, if necessary. Despite Plaintiffs' invitation to reach the impairment of contract argument, the Court declines to do so because the state has not had the opportunity to respond to this claim.

> A health technology not included as a covered benefit under a state purchased health care program pursuant to a determination of the [HTCC] ... shall not be subject to a determination of an individual patient as to whether it is medically necessary, or proper and necessary treatment.

RCW 70.14.120(3). Division II of the Court of Appeals held that "[a] HTCC non-coverage determination is a determination that the particular health technology is not medically necessary in *any* case." Joy, 170 Wn. App. at 624.

Although RCW 70.14.120(4) states that nothing in the statute "diminishes an individual's right under existing law to appeal an action or decision of a participating agency regarding a state purchased health care program," the Joy court concluded that subparagraph (3) precludes a person from obtaining judicial review of the denial of coverage when the denial is based on an HTCC decision. Id. at 627.

The Joy court noted that the bill, as passed by the legislature, contained a section providing appeal rights to patients:

> Appeal process: The administrator shall establish an open, independent, transparent, and timely process to enable patients, providers, and other stakeholders to appeal the determinations of the health technology clinical committee made under section 4 of this act.

ESSHB 2575, § 6, Chapter 307, Laws of 2006 (eff. date 6/7/06). Governor Gregoire, however, vetoed Section 6, stating:

> I strongly support ESSHB No. 2575 and particularly its inclusion of language that protects an individual's right to appeal. ... [Section 5(4)] is an important provision and one that I support whole-heartedly.
>
> I am, however, vetoing Section 6 of this bill, which establishes an additional appeals process for patients, providers and other stakeholders who disagree with the coverage determinations of the Health Technology Clinical Committee. The health care provider expertise on the clinical committee and the use of an evidence-based practice center should lend sufficient confidence in the quality of decisions made. Where issues may arise, I believe the individual appeal process highlighted above is sufficient to address them, without creating a duplicative and more costly process.

Id. The Joy court noted that the legislature failed to override this veto. 170 Wn. App. at 626. It concluded that "[i]n the absence of section 6 ... it appears there is no statutory procedure for substantively challenging HTCC determinations." 170 Wn. App. at n.13.

Judge Sund argues that without the ability to substantively challenge the HTCC's coverage decision, the HTCC law constitutes an unlawful delegation of legislative authority to an unelected commission. Under Barry and Barry, Inc. v. Dept. of Motor Vehicles, 81 Wn.2d 155, 159, 500 P.2d 540 (1972), it is not unconstitutional for the legislature to delegate administrative power to an agency or commission if (1) the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that procedural safeguards exist to control arbitrary administrative action and administrative abuse of power. This Court evaluates Judge Sund's constitutional argument under the appropriate standard of review: the Court must presume the statute to be constitutional and when a statute is challenged as unconstitutional, the Court must be convinced by argument and research that there is no reasonable doubt that the statute violates the constitution. Island County v. State of Washington, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

Judge Sund does not challenge the HTCC law under the first prong of the Barry test; his challenge focuses on the second—the lack of adequate procedural safeguards. The HCA contends that there is no constitutional infirmity because the HCA has promulgated rules governing how HTCC members are selected and how they are to assess health technologies, the HCA provides public notice of the technologies to be assessed by the HTCC and the HTCC deliberations themselves are public, and members of the public may submit comments to the HTCC before it renders a final decision.

The Court agrees with Judge Sund that these procedures are insufficient under Barry to protect from arbitrary agency decisions. For example, the HTCC decisions are not self-executing; the HCA must decide if and when to implement them. Under RCW 70.14.120(1), the

HCA is legally prohibited from implementing an HTCC determination if it conflicts with an applicable federal or state law. Because the Joy decision precludes judicial review of HCA's decision to implement the HTCC coverage determination, there is absolutely no mechanism for anyone to enforce this legal obligation.

Moreover, Judge Sund contends that the HTCC violated RCW 70.14.110(3), under which any decision:

> shall be consistent with decisions made under the federal Medicare program and in expert treatment guidelines, including those from specialty physician organizations and patient advocacy organizations, unless the committee concludes, based on its review of the systematic assessment, that substantial evidence regarding the safety, efficacy, and cost-effectiveness of the technology supports a contrary determination."

This provision is an "applicable" state statute within the meaning of RCW 70.14.120(1) and the HCA is legally prohibited from implementing an HTCC decision that conflicts with this statutory mandate. Yet, again, under Joy, there is no method for requiring the HCA to comply.

Judge Sund also argues that the HTCC decision conflicts with RCW 70.14.100(4)(d), under which the HCA must contract for technology assessments that:

> ... (i) Give the greatest weight to the evidence determined, based on objective indicators, to be the most valid and reliable, considering the nature and source of the evidence, the empirical characteristic of the studies or trials upon which the evidence is based, and the consistency of the outcome with comparable studies; and (ii) take into account any unique impacts of the technology on specific populations based upon factors such as sex, ethnicity, race or disability.

Under this section of the law, the HCA has a statutory obligation to provide the specified information to the HTCC before the HTCC renders a coverage decision. Again, the HCA's failure to comply with this legal duty is unreviewable under Joy.

None of the statutory or regulatory provisions to which the HCA cites would provide a way to appeal or challenge the HCA's own actions or inactions. Although the Administrative Procedures Act allows an individual adversely affected by an agency action to appeal to superior court, RCW 34.05.570(4), the Joy court has interpreted RCW 70.14.120(3) to not only insulate the HTCC's actions from judicial review but also to insulate the HCA's decision on

implementation of the HTCC coverage decisions from any judicial review. This result conflicts with the APA and with the provision of RCW 70.14.120(4). This Court has found, and the HCA has cited, no case law to support the contention that a statute denying any judicial review of an agency action meets the procedural safeguard mandate of Barry. For these reasons, the Court concludes that RCW 70.14.120(3), as interpreted by Joy, is an unconstitutional delegation of administrative authority.

This ruling does not, however, lead to the conclusion that Judge Sund is automatically entitled to coverage for SCS under the 2012 UMP. The remedy for the specific constitutional defect in the HTCC law is not to invalidate the HTCC's decision. It is, instead, to give Judge Sund the judicial review that the constitution requires to pass the Barry test. This Court concludes that Judge Sund must demonstrate that the HCA either failed to fulfill its duties under RCW 70.14.110(3) and RCW 70.14.100(4)(d) before implementing the HTCC coverage determination or that the HCA's action in implementing the coverage exclusion was otherwise unlawful, arbitrary or capricious. The Court makes no ruling on these contentions at this time as there are genuine issues of material fact in dispute on these issues.

ORDER

Based on the foregoing, the Court GRANTS in part and DENIES in part Plaintiffs' motion for partial summary judgment on breach of contract and regulatory violations. The Court GRANTS Plaintiffs' motion for partial summary judgment holding that the HTCC law is unconstitutional to the extent it prohibits judicial review of the HCA's decision to implement the HTCC non-coverage determination. The Court DENIES the HCA's motion for summary judgment.

Dated this 22nd day of October, 2013.

Beth M Andrus

Honorable Beth Andrus
King County Superior Court

BURI FUNSTON PLLC

October 10, 2016 - 11:34 AM

Transmittal Letter

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